



and prior to the time the Court contemplated depositions being completed. In addition, the State is producing all of the materials considered by each expert 21 days prior to his or her deposition. As explained below, this is reasonable and provides no reason for Defendants to ask, yet again, for delay. In fact, this schedule is in full compliance with Judge Frizzell's directives on December 7th.

#### **I. The State's Proposed Schedule Is Reasonable**

During the Court's December Scheduling Conference, through a combination of agreement and Court order, the Preliminary Injunction hearing was scheduled to begin on February 19, 2008 and last for seven non-consecutive days. Defendants' deadline to respond to the State's Motion was set for February 8, 2008. The State was ordered to produce the materials of each of the State's experts to Defendants by no later than 21 days prior to his or her deposition.

In the spirit of the Court's order, the State offered the following deadlines based on the availability of each expert and the amount of time required to produce their respective expert materials:

| <b>Witness</b>     | <b>Deadline to Deliver Materials to Defendants</b> | <b>Status</b>                      | <b>Deposition Date</b> |
|--------------------|--|------------------------------------|------------------------|
| Robert S. Lawrence | 12/13/2007   | Complete                           | 1/3/08                 |
| C. Robert Taylor   | 12/18/2007   | Complete                           | 1/8/08                 |
| Lowell Caneday     | 12/21/2007   | Complete                           | 1/11/08                |
| Bernard Engel      | 12/25/07   | Sent on 12/20/07                   | 1/15/08                |
| Valerie J. Harwood | 1/2/08   | Sent part of materials on 12/20/07 | 1/23/08                |
| Gordon V. Johnson  | 1/4/08   | In progress                        | 1/25/08                |
| J. Berton Fisher   | 1/8/08   | In progress                        | 1/29/08                |
| Christopher Teaf   | 1/10/08  | In progress                        | 1/31/08                |
| Roger Olsen        | 1/16/08  | In progress                        | 2/06/08                |

As noted above, Defendants have the materials considered by Drs. Lawrence, Taylor and Caneday and should have Dr. Engel's materials by December 21, 2007. The State has also sent the majority of the materials considered by Dr. Harwood with the exception of a report that is being finalized and some underlying data supporting the reports she relied upon. That information will be produced no later than 21 days prior to her January 23, 2008 deposition. The State is also working toward producing the remaining materials in accordance with the schedule set forth above, if not before.

Defendants will have had the benefit of having all of the materials considered by the experts in conjunction with the opinions set forth in their affidavits for more than a month prior to the hearing. Indeed, as set forth in greater detail below, Defendants will have had a large volume of sampling data considered by the experts for more than a year before the hearing. Defendants will have ample time to review any additional data provided in connection with the experts' disclosure of considered materials and respond to the State's motion. This schedule is entirely reasonable. It provides Defendants with sufficient time to review the materials considered by the experts, take their depositions, and prepare for the hearing.

The State initially proposed that it provide each expert's reliance materials seven days prior to his or her deposition. Under that schedule, depending on the experts' availability, Defendants feasibly could have been provided deposition dates earlier than those currently proposed. However, Defendants insisted that they receive a larger scope of materials further in advance than that proposed by the State. As a result, the deposition dates had to be pushed out further to allow for further expert collection of

materials, additional attorney review of materials, and processing of additional materials.<sup>1</sup>

The materials Defendants demanded required additional time and resources. The State has endeavored to comply, and has complied with, the decisions made by the Court and agreements made during the December 7 Scheduling Conference.

## **II. The Schedule in Place is Consistent with that Contemplated by the Court and the Parties.**

During the telephonic hearing on December 7, 2007, the Court and the parties contemplated that depositions of the State's experts would occur up to the February 19, 2007 hearing. In response to one of the very issues raised by Defendants, namely Defendants' deadline to file a response to the State's motion, the following exchange took place between Defendants and the Court:

THE COURT: Well, that may be problematic because I anticipate that you're going to be taking depositions up to the day --

MR. GEORGE: Very close, Your Honor.

THE COURT: -- of the first day of the hearing given the type [sic] time frame the plaintiffs have asked for. So with all respect I think I need to give you a date certain Mr. George. And I only need enough time to actually have a chance to read and try to absorb the filings on both sides. And that really needs to be done, given the volume of materials that tend to be produced here, it would seem to me that, I don't know, February 8<sup>th</sup>, how would that be?

MR. GEORGE: That would be acceptable, Your Honor. I think that's a fair approach.

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<sup>1</sup> In addition to Defendants' demands for a broader scope of materials and additional time to review those materials, two of the State's experts have had complications that have prevented them from gathering materials as quickly as they otherwise might have. Dr. Fisher spent several days in the hospital earlier this month for testing. Dr. Olsen was out of the country working when the materials were initially requested.

Transcript, at 48:15-49:3. Now Defendants come back to the Court stating that the State's compliance with the Court's rulings is "fundamentally unfair."<sup>2</sup> However, the State is in strict compliance with what the Court and the parties contemplated during the December 7, 2007 scheduling conference.

What is fundamentally unfair is not the reasonable schedule of depositions the State has proposed for the depositions of its experts with respect to the Preliminary Injunction Motion, but rather is the continued pollution of Oklahoma's waters while Defendants feign ignorance of the constituents of the waste from their poultry. Any claim that the State is now engaging in "delay tactics" in light of Defendants' total inaction with respect to analyzing its own waste is absurd. The State has undertaken the job of sampling and analyzing Defendants' waste—a job that Defendants should have undertaken long ago. Defendants now use the fact that it took the State two years to conduct the sampling that Defendants should have previously conducted to cry foul against the State's attempt to comply with the reasonable schedule set by this Court. This should not be condoned by the Court.

### **III. Defendants Cannot Claim Surprise with Respect to the State's Motion**

Defendants claim that the State "secretly worked on" its Motion for Preliminary Injunction. That representation is preposterous. As noted by the Court in its December 7, 2007, hearing, "Mr. Bullock . . . I was in the rear of the courtroom as you noted on the

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<sup>2</sup> Despite Defendants' protestations that they will be unable to defend against the preliminary injunction request if they must depose the State's experts on the schedule offered, the Defendants have noticed at least eight additional depositions for January, 2008. Defendants' own actions demonstrate that they are adequately staffed to conduct substantial discovery in advance of the preliminary injunction setting. Moreover, if Defendants have failed to retain experts at this point, the blame cannot be placed on the State. Defendants have fair notice of the issues and should have their retained experts on standby given the schedule set by the Court.

record in your meeting with Judge Joyner last month and you for apparently the **fourth time**, noted for the record that you were likely to file a motion for preliminary injunction, although the details of which were not set forth.” See Scheduling Conference Transcript, at 16:20-17:3. There is, and has been, no surprise with the filing of the motion.

Moreover, since the beginning of this lawsuit two years ago, Defendants have been on notice of the claims regarding elevated levels of bacteria in the Illinois River Watershed and the resulting endangerment of human health. See First Amended Complaint at ¶¶ 58, 64, 100, and 135. Finally, since February 1, 2007, the State has been providing sampling data to Defendants with regard to all sampling being conducted in the IRW. To date, 30,974 pages of data have been provided to Defendants. This includes all sampling conducted by the State’s experts. Defendants’ spurious claims of secrecy and surprise may provide for interesting reading; however, they have no basis in reality and, therefore, provide no basis for the relief sought.

Defendants also imply that the State is holding back documents that its experts considered or reviewed in formulating their opinions. See Defendants’ Motion at p. 3 (“To the extent any expert documents were offered, the Plaintiffs [sic] were careful to couch it in terms of offering only ‘reliance materials’ (*i.e.*, materials relied upon by the experts as opposed to materials reviewed by the experts).”) While production of only reliance materials may have been the State’s initial position, the State agreed to produce “all of the things considered for the bacteria case at this point” during the December 7, 2007 Scheduling Conference. Transcript, at 41:12-14. Moreover, as noted previously, these materials are being produced in accordance with the schedule set forth above. Therefore, this argument is simply a red herring.

Defendants repeatedly claim that the State “should have” done several things, such as identifying experts prior to filing its motion and producing the materials at issue contemporaneously with the filing of its Motion. What Defendants fail to do is cite any authority for that position. As the Court previously recognized in fashioning the 21-day rule, “[w]ell, in practice, of course, that procedure, the Rule 26 requirements don’t typically apply, but as we’ve noted here this seems to be a hybrid.” Transcript, at 35:1-3. The Court then went on to require that the State provide the expert materials 21 days prior to that expert’s deposition. That is exactly what the State has done and will continue to do.

**V. Conclusion**

The State has violated no discovery rules or orders by this Court. The only issue before the Court is that Defendants do not like the order of or dates for the depositions of the State’s experts. As set forth above, the State’s proposed schedule is within the parameters set during the December 7, 2007 Scheduling Conference. Defendants’ motion should be denied.

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